92-1025

No. _____

Supreme Court, U.S.
FILED
JAN 4 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

IRENE L. TORRES, *Petitioner*,

v.

ASARCO, INC., *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

KENNETH R. CARR
Counsel of Record
CHARLES C. HIGH, JR.
Kemp, Smith, Duncan & Hammond, P.C.
P.O. Drawer 2800
El Paso, Texas 79999-2800
(915) 533-4424
Counsel for Respondent

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 2

ARGUMENT 4

CONCLUSION 12

TABLE OF AUTHORITIES

Cases — *Page*

Amburgey v. Corhart Refractories Corp., 936 F.2d 805 (5th Cir. 1991) 10

Bell v. Birmingham Linen Service, 715 F.2d 1552 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984) . . . 6

Braxton v. United States, 500 U.S. ___, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991) 4

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 9

Dwyer v. Smith, 867 F.2d 184 (4th Cir. 1989) 7

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) . . 6, 7

Grigsby v. Reynolds Metals Co., 821 F.2d 590 (11th Cir. 1987) . 7

Jones v. Gerwens, 874 F.2d 1534 (11th Cir. 1989) 7

Laurence v. Chevron U.S.A., 885 F.2d 280 (5th Cir. 1989) 7

McDonnell Douglas v. Green, 411 U.S. 792 (1973) 4-9

Pace v. Southern Railway System, 701 F.2d 1383 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983) 6, 10

Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633 (5th Cir. 1985) 6, 10

Vaughn v. Edel, 918 F.2d 517 (5th Cir. 1990) 8, 9

Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. Unit B Sept. 1981), *cert. denied*, 455 U.S. 943 (1982) 8

Yartzoff v. Thomas, 809 F.2d 1371 (9th Cir. 1987) 7

Rule

Sup. Ct. R. 10.1 4

No._____

In The

Supreme Court of the United States

October Term, 1992

IRENE L. TORRES,

Petitioner,

vs.

ASARCO, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respondent, ASARCO Incorporated, respectfully requests that Petitioner's petition for writ of certiorari be denied.

STATEMENT OF THE CASE

Torres has made several assertions in her statement of the case which are unsupported by the record and has omitted several important facts. Therefore, for the purposes of this proceeding, ASARCO Incorporated ("the Company") offers the following abbreviated statement of facts.

Petitioner ("Torres") is an Hispanic female who worked in various clerical positions in the Company's El Paso smelter from 1973 to 1985. In 1985, the Company suspended operations of its lead smeltering plant in El Paso because of severe economic losses. As a result of the shutdown, over 200 hourly employees were laid off. The Company also reduced its salaried workforce of which Torres was a member. The salaried staff reduction was accomplished through a voluntary retirement program and then through the elimination of jobs and consequent termination of employees. In the accounting department, where Torres worked, five employees chose the early retirement option, thus eliminating five job positions. The Company then decided to eliminate four additional clerical positions, including Torres' stenographer position. Of the four employees who were terminated when their jobs were eliminated, one was an Hispanic

male, one was an Anglo female, and two (including Torres) were Hispanic females.

The duties of the nine positions that were eliminated in the accounting department were consolidated or merged into other jobs. Seven accounting department employees were then assigned or transferred to the consolidated job positions. Of these seven employees, four were Hispanic males, one was an Anglo male, one was an Anglo female, and one was an Hispanic female. None of these employees required or was provided training for the consolidated jobs, and Torres did not testify or present any other evidence that these employees received such training.

After the elimination and consolidation of jobs in the accounting department, only one job remained for which Torres, by her own admission, was qualified. That position was the combined secretary-insurance clerk position. That position, however, was assigned to Irma Escarciga, another Hispanic female, whom the Company considered better qualified for the position than Torres.

ARGUMENT

Petitioner Has Asserted No Valid Reasons Why Certiorari Should Be Granted

"A petition for writ of certiorari will be granted only when there are special reasons therefor." Sup. Ct. R. 10.1. Conflicting decisions among federal courts of appeals, conflicting decisions among state courts of last resort, or the need to settle an important question of law are the types of reasons which justify review of a federal appellate court decision on certiorari. *Id.*; *see also Braxton v. United States*, 500 U.S. ___, ___, 111 S. Ct. 1854, ___, 114 L. Ed. 2d 385, 391 (1991) (principal purpose of certiorari jurisdiction is to resolve conflicts among federal courts of appeals and state courts concerning federal law). The questions presented by Torres in her petition for writ of certiorari, however, do not implicate any of these factors and, consequently, do not merit review on certiorari.

This is a simple employment discrimination case in which Torres claims that she lost her job because of her sex and national origin. Torres' first question presented is whether the well-accepted allocation of proof for employment discrimination cases articulated in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), and its progeny

is adequate for a situation in which the alleged discrimination consists of discriminatory denial of retraining for a new position following elimination of an employee's former job. At the outset, the claim which predicates this question was not presented to either the district court or the court of appeals. Torres' complaint to the district court alleged that she was terminated because of her sex and national origin in violation of Title VII. She made no allegation that she was denied retraining. The question she presented to the Fifth Circuit Court of Appeals for review was whether the district court erred in holding that the circumstantial evidence she presented to support her claim of unlawful termination was insufficient to raise any genuine issue of material fact. Neither court was asked to determine the question presented to this Court, and indeed, there was no evidence before either court that would have allowed them to do so. Accordingly, the question presented to this Court and the claim underlying it have never before been raised. Even so, there is nothing that justifies this Court in reviewing it now.

This Court and appellate courts from all circuits have long recognized that, in a case lacking direct evidence of discrimination, the allocation of proof articulated in *McDonnell Douglas* and its

progeny represents the classic and most common form of proof in employment discrimination cases. *See, e.g., Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978); *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984). In *McDonnell Douglas*, the Court developed a tripartite allocation of proof which first requires the plaintiff to establish a prima facie case of discrimination. The prima facie case, of course, creates a presumption or inference of discrimination which can be rebutted if the defendant articulates a legitimate, nondiscriminatory reason for the decision at issue. If the defendant does articulate a legitimate, nondiscriminatory reason, the plaintiff must prove that the reason is pretextual or somehow unworthy of belief. 411 U.S. at 802-05. The first hurdle a plaintiff must clear, though, is the establishment of a prima facie case. Failure to do so is grounds for summary judgment. *See Pace v. Southern Railway System*, 701 F.2d 1383, 1390 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983); *see also Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 645 n.19 (5th Cir. 1985) (failure to establish prima facie case generally means there are no material facts at issue).

In *McDonnell Douglas*, which involved a discriminatory failure to hire claim, the Court concluded that the plaintiff could establish a prima facie case by showing that (1) he belonged to a protected group; (2) he applied and was qualified for an available job; (3) despite the plaintiff's qualifications, he was rejected; and (4) after rejection, the employer continued to seek applicants. 411 U.S. at 802. Torres argues that this formulation for a prima facie case is not suitable for her claim. Courts have long recognized, however, that the specific prima facie formulation found in *McDonnell Douglas* was never meant to be "rigid, mechanized or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco*, 438 U.S. at 577. Thus, courts have modified the *McDonnell Douglas* formulation to fit a variety of discrimination claims. *See, e.g., Laurence v. Chevron U.S.A.*, 885 F.2d 280, 283 (5th Cir. 1989) (promotion); *Jones v. Gerwens*, 874 F.2d 1534, 1540 (11th Cir. 1989) (discipline); *Dwyer v. Smith*, 867 F.2d 184, 190 (4th Cir. 1989) (discharge); *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 595 (11th Cir. 1987) (demotion); *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987) (retaliation).

On two occasions, the Fifth Circuit has even formulated versions of the *McDonnell Douglas* prima facie case to address discrimination claims, such as the one asserted by Torres in her complaint to the district court, arising from a layoff during a reduction in force. In *Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. Unit B Sept. 1981), *cert. denied*, 455 U.S. 943 (1982), the Fifth Circuit reasoned that a prima facie case of discrimination in a reduction in force could be established if the plaintiff could: (1) show that she is a member of a protected class; (2) show that she was qualified to assume another position with the defendant at the time of the reduction in force; and (3) and produce some evidence, either circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate against the plaintiff. *Id.* at 129. Later in *Vaughn v. Edel*, 918 F.2d 517 (5th Cir. 1990), the Fifth Circuit formulated a somewhat different prima facie case for a discrimination claim arising out of a reduction in force layoff. Under that formulation, the plaintiff must show that: (1) she is a member of the protected group; (2) she was qualified for the job she held; (3) she was discharged; and (4) other employees who were not members of the protected class remained in similar positions. *Id.*

at 521. Both the district court and Fifth Circuit Court of Appeals used the *Vaughn* formulation to analyze Torres' claims in this case. Therefore, contrary to Torres' claim that *McDonnell Douglas* is difficult to apply, it instead provides a flexible approach, one that is easily adaptable to evaluate employment discrimination claims of all sorts, including the claims asserted by Torres in this case. There is absolutely no reason to revisit *McDonnell Douglas* to determine whether it still provides an adequate formulation of the burden of proof in employment discrimination cases or to reject the district court's and the court of appeals' reliance upon that case, given its established history of assisting plaintiffs like Torres prove discrimination. This case then simply does not present an issue worthy of this Court's valuable time and attention.

Torres' second question presented to this Court is whether summary judgment is appropriate in employment discrimination cases. Summary judgment is a procedure designed to eliminate claims which have no factual basis before trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). No court has ever held that summary judgment cannot be used to eliminate unmeritorious employment discrimination claims. There are clear reasons for this. A plaintiff who cannot show

that genuine issues of material fact exist with respect to her employment discrimination claim is no more entitled to proceed to trial than a plaintiff who cannot present genuine issues of material fact with respect to a products liability, libel, or conspiracy claim. Federal courts have certainly recognized this, having granted summary judgment in employment discrimination cases, just as in any other case, where there are no genuine issues of material fact which would justify the lawsuit's proceeding to trial. *See, e.g., Amburgey v. Corhart Refractories Corp.*, 936 F.2d 805, 814 (5th Cir. 1991); *Pace v. Southern Railway System*, 701 F.2d 1383, 1392 (11th Cir.), *cert. denied*, 464 U.S. 1018 (1983). In fact, the Fifth Circuit Court of Appeals, in a decision in which it reversed a granting of summary judgment, recognized that the "salutary function of summary judgment in the employment discrimination arena [is that it] allows patently meritless cases to be nipped in the bud ...." *Thornbrough*, 760 F.2d at 645 n.19.

The present case illustrates the appropriateness of summary judgment in employment discrimination cases. Here, Torres was one of four employees laid off from the Company's accounting department during a reduction in force in 1985. She claims, however, that she

should not have have been laid off but should have been transferred to another position like some other employees were. The undisputed evidence before the district court showed that seven accounting department employees were transferred to other jobs instead of being terminated. These seven employees included five Hispanics and two females and none required retraining. Moreover, the *only* position Torres was qualified to perform after the reduction in force was the position of insurance secretary, which was occupied by Irma Escarciga, an Hispanic female. Thus, Torres presented absolutely no evidence even suggesting that she was treated unfavorably or differently because of her sex or national origin. As a result, she failed to present a genuine issue of material fact, making it unnecessary for her lawsuit to proceed to trial. Therefore, summary judgment served its purpose in this case, just as it does in other employment discrimination cases. There is, quite plainly, no reason that merits this Court's review of whether summary judgment is an inappropriate procedure to nip unmeritorious employment discrimination claims in the bud.

CONCLUSION

For the foregoing reasons, the Company requests that the Court deny Torres' petition for writ of certiorari.

Respectfully submitted,

KEMP, SMITH, DUNCAN & HAMMOND, P.C.
P.O. Drawer 2800
El Paso, Texas 79999-2800
(915) 533-4424
(915) 546-5360 (FAX)

By _____
KENNETH R. CARR
CHARLES C. HIGH, JR.
Attorneys for ASARCO Incorporated